



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

6-2786
GERALD C. MANN
ATTORNEY GENERAL

Honorable W. Lee O'Daniel
Governor of Texas
Austin, Texas

Dear Sir:

Opinion No. O-2786

Re: Effect of assuming the position of County Chairman of Democratic Executive Committee on the right of one to continue to hold a state office.

Your letter of September 26, 1940, submits the following question to this department for an opinion:

Did Murrell L. Buckner as a matter of law vacate the office of Member of the Game, Fish & Oyster Commission of Texas in January, 1940, when he attempted to qualify as Chairman of the County Executive Committee of the Democratic Party, Dallas County, Texas?

Article 2940, Vernon's Revised Civil Statutes of Texas, provides:

"No one who holds an office of profit or trust under the United States or this State, or in any city or town in this State, or within thirty (30) days after resigning or being dismissed from any such office, except a notary public, or who is a candidate for office, or who has not paid his Poll Tax, shall act as judge, clerk or supervisor of any election; nor shall any one act as chairman or as member of any District, County or City Executive Committee of a political party who has not paid his Poll Tax, or who is a candidate for office, or who holds any office of profit or trust under either the United States or this State, or in any city or town in this State;

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or who may be enjoying gratuitous passage on street cars or on other public service corporations, by reason of his appointment as a special policeman; or any one who has any connection, whatever, with the city, whereby the city is justified in issuing to any such person free transportation on the street cars, or franks entitling him to the free use of public service corporations, or any person who is regularly employed in any capacity by the city for whose services a salary or wages is paid, except a notary public."

Article 978f, Penal Code, provides for the creation of the Game, Fish & Oyster Commission, which consists of six members appointed by the Governor from different sections of the State, by and with the advice and consent of the Senate. This article provides for the appointment of such members for terms of six years, the terms of the various members being staggered. Each member of the Commission is required to execute a bond payable to the State of Texas in the sum of \$5,000.00. The Commission is authorized to make rules and regulations for the conduct of its work, not inconsistent with the Constitution and laws of the State, and the members of the Commission receive as compensation for their services their actual expenses in the performance of their duties. The Commission is given the authority to appoint an executive secretary who acts as the chief executive officer under the direction of the Commission, and it is provided that the Commission may perform its duties through said executive secretary and may delegate to him such executive duties as the Commission shall deem proper. The Commission has also the authority to appoint an assistant executive secretary, who, in the absence of the executive secretary, shall perform all of the duties of the executive secretary, and such other duties as may be prescribed by the Commission.

A Member of the Game, Fish & Oyster Commission of Texas clearly holds a public office. Willis v. Owen, 43 Tex. 41; Thomas, et al v. Abernathy County Line Independent School District, et al, 278 S. W. 312; State of Montana, Ex rel Julius Barney v. R. N. Hawkins, Secretary of State, 257 Pac. 411, 53 A. L. R. 583, and annotations. While the office is, in our opinion, not one of profit, because provision is made only for reimbursement of actual expenses

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incurred, the very enumeration of the powers and duties which are possessed by the Game, Fish & Oyster Commission makes it evident that the office which they hold under the State is one of trust.

Article 16, Section 40, of our Constitution, prohibits the holding of two civil offices of emolument. This constitutional provision, however, has application only to "public" offices. The office of Game, Fish & Oyster Commissioner is, of course, a public office; but the courts of this State have held that officers of a political party, such as members of a party executive committee, are not public officers, though they are provided for by statutory law. *Walker v. Mobley*, 101 Tex. 28, 103 S. W. 490; *Walker v. Hopping*, (Civ. App.) 226 S. W. 146; *Ex parte Anderson*, 51 Cr. Rep. 239, 102 S. W. 727. It is therefore apparent that the constitutional provision has no application to the situation presented in your letter.

Likewise, the common law rule with reference to the vacating of one office by the acceptance of another office incompatible therewith does not apply to the instant situation.

"Officers are incompatible where their duties are or may be inconsistent or conflict, but not where their duties are wholly unrelated, are in no manner inconsistent and are never in conflict; and where neither officer is accountable to or under the dominion of, or subordinate to, the other, or has any right or power to interfere with the other in the performance of any duty."
34 Texas Jurisprudence, p. 351.

We observe no incompatibility between the holding of the office of Game, Fish & Oyster Commissioner and the holding of the position of Chairman of a County Democratic Executive Committee, and no such incompatibility is pointed out in the material which accompanies your letter. The sole question, therefore, remaining to be disposed of in connection with your inquiry is that concerning the effect of the statute above quoted.

There can be no doubt of the authority of the Legislature to provide that the acceptance and exercising of the position of Chairman of the County Executive Committee

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of a political party by a person holding a public office should operate ipso facto to vacate that office; but this, apparently, the Legislature has not seen fit to do. Article 2940 merely provides "no one . . . shall act as judge, clerk or supervisor of any election. . . nor shall anyone act as chairman or as member of any district, county or city executive committee of any political party who . . . holds any office of profit or trust under either the United States or this state . . . "

An office holder who acts in one of the capacities mentioned, in violation of the provisions of Article 2940, does not, as that article is interpreted by the courts of this State, vacate ipso facto his office under the State. *Savage v. Humphreys*, (Civ. App.) 118 S.W. 901; *Gayle v. Alexander*, (Civ. App.) 75 S.W. (2d) 708.

You are therefore advised that Mr. Buckner, by accepting and attempting to exercise, in violation of Article 2940, the office of County Chairman of the County Democratic Executive Committee of Dallas County, did not vacate his state office as member of the Game, Fish & Oyster Commission.

Yours very truly

ATTORNEY GENERAL OF TEXAS



By

R. W. Fairchild

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Assistant

RWF:GO

APPROVED OCT 28, 1945

Gerald B. Mann

ATTORNEY GENERAL OF TEXAS